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The Work of the Permanent Court of International Justice during its First Two Years

By MANLEY O. HUDSON
Bemis Professor of International Law
at the Harvard Law School

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*FOUNDED IN 1910 BY EDWIN GINN

The corporation is constituted for the purpose of educating the people of all nations to a full knowledge of the waste and destructiveness of war, its evil effects on present social conditions and on the well-being of future generations, and to promote international justice and the brotherhood of man; and, generally, by every practical means to promote peace and good will among all mankind.—*By-laws of the Corporation.*

It is to this patient and thorough work of education, through the school, the college, the church, the press, the pamphlet and the book, that the World Peace Foundation addresses itself.—Edwin Ginn.

The idea of force can not at once be eradicated. It is useless to believe that the nations can be persuaded to disband their present armies and dismantle their present navies, trusting in each other or in the Hague Tribunal to settle any possible differences between them, unless, first, some substitute for the existing forces is provided and demonstrated by experience to be adequate to protect the rights, dignity and territory of the respective nations. My own belief is that the idea which underlies the movement for the Hague Court can be developed so that the nations can be persuaded each to contribute a small percentage of their military forces at sea and on land to form an *International Guard or Police Force.*—Edwin Ginn.

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STATES WHICH HAVE SIGNED THE PROTOCOL OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE[1]

Albania
Australia
Austria
Belgium
Bolivia
Brazil
British Empire
Bulgaria
Canada
Chile
China
Colombia
Costa Rica
Cuba
Czechoslovakia
Denmark
Esthonia
Finland
France
Greece
Haiti
Hungary
India
Italy
Japan
Latvia
Liberia
Lithuania
Luxemburg
Netherlands
New Zealand
Norway
Panama
Paraguay
Persia
Poland
Portugal
Rumania
Salvador
Serb-Croat-Slovene State
Siam
South Africa, Union of
Spain
Sweden
Switzerland
Uruguay
Venezuela

Total: 47

[1] Prior to May 1, 1924.

JUDGES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE[1]

Elected September 14–15, 1921, to serve nine years

Judge	*National of*
Rafæl ALTAMIRA y Crevea	Spain
Dionisio ANZILOTTI	Italy
Epitacio da Silva PESSOA[2]	Brazil
Antonio Sánchez de BUSTAMANTE	Cuba
Robert Bannatyne Viscount FINLAY	Great Britain
Hans Max HUBER	Switzerland
Bernard Cornelis Johannes LODER, President	Netherlands
John Bassett MOORE	United States
Didrik Galtrup Gjedde NYHOLM	Denmark
Yorozu ODA	Japan
Charles André WEISS, Vice-President	France

Deputy Judges

Frederik Valdemar Nikolai BEICHMANN	Norway
Mikhailo JOVANOVICH	Serb-Croat-Slovene State
Demitrie NEGULESCO	Rumania
WANG Ch'ung-hui	China

Registrar—M. Åke Hammarskjöld (Sweden)

[1] On May 1, 1924.

[2] Elected September 10, 1923, to succeed Ruy Barbosa (d. March 1, 1923).

DATES IN THE HISTORY OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

1. February 13, 1920—The Council of the League of Nations sets up a Committee of Jurists to draft the Statute of a Court.
2. June 16, 1920—The Committee of Jurists meets at The Hague.
3. August 5, 1920—Draft of the Statute submitted by the Committee of Jurists to the Council.
4. December 13, 1920—Draft Statute as amended approved by the First Assembly of the League of Nations.
5. December 16, 1920—Statute annexed to a special treaty, called the Protocol of Signature, signed by forty-seven states.
6. September 16, 1921—The first election of Judges completed.
7. January 30, 1922—The Court meets at The Hague for its first session.
8. March 24, 1922—Rules of Court promulgated.
9. May 12, 1922—The Court is opened to all states in the world.
10. June 15, 1922—The Court meets at The Hague for its second session, and hands down three advisory opinions.
11. January 8, 1923—The Court meets at The Hague for its third session and hands down a fourth advisory opinion.
12. February 24, 1923—President Harding asks the Senate to advise and consent to the adhesion to the Court Protocol by the United States.
13. June 15, 1923—The Court meets at The Hague for its fourth session and hands down three advisory opinions and one judgment.
14. September 10, 1923—Judge Pessoa of Brazil was elected to fill the vacancy caused by Judge Barbosa's death.
15. November 18, 1923—The Court meets at The Hague for its fifth session, and hands down one advisory opinion.
16. December 6, 1923—President Coolidge commends the proposed adhesion by the United States to the Protocol of Signature to the Court to the favorable consideration of the Senate.
17. June 15, 1924—The Court will meet at The Hague for its sixth session.

THE WORK OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE DURING ITS FIRST TWO YEARS[1]

By Manley O. Hudson

BEMIS PROFESSOR OF INTERNATIONAL LAW AT THE HARVARD LAW SCHOOL

First Advisory Opinion of the Permanent Court of International Justice.—Nomination of Delegates to the International Labor Conference[2]

A member of the International Labor Organization is not bound to consult the largest employers' or workers' organization, in selecting its delegates to the International Labor Conference, where other organizations total more members.

On May 12, 1922, the Council of the League of Nations adopted a resolution requesting the Permanent Court of International Justice to give an advisory opinion on the following question: "Was the Workers' Delegate for the Netherlands at the third session of the International Labor Conference nominated in accordance with the provisions of paragraph 3 of Article 389 of the Treaty of Versailles?" The question came before the Court at its first regular session on June 15, 1922. Briefs were presented to the Court on behalf of the Netherlands Government, the International Labor Office, and the Netherlands General Confederation of Trades Unions. Oral arguments were heard on behalf of the British and Netherlands Governments, the International Federation of Trades Unions, the International Federation of Christian Trades Unions, and the International Labor Office.

[1] Reprinted from articles in the American Bar Association Journal for February, March and April, 1924.

[2] Reported in Publications of the Permanent Court of International Justice, Series B, No. 1.

The publications of the Permanent Court of International Justice may be obtained from the World Peace Foundation, 40 Mt. Vernon St., Boston, Mass.

At the third session of the International Labor Conference, held at Geneva from October 25 to November 18, 1921, a protest was made against the acceptance by the Conference of the credentials of the workers' delegate named by the Netherlands Government. At previous sessions of the Conference, the workers' delegate named by the Netherlands Government had been nominated in agreement with the Netherlands Confederation of Trades Unions. But the workers' delegate to the third session in 1921 was nominated in agreement with the Confederation of Catholic Trades Unions, the Confederation of Christian Trades Unions, and the Netherlands General Confederation of Trades Unions, though not in agreement with the Netherlands Confederation of Trade Unions. The last-named organization had a membership of 218,596 trade unionists; the other organizations had a total membership of 282,455 trade unionists, though no one had a membership in excess of 155,642.

Article 389 of the Treaty of Versailles requires that non-government delegates to the International Labor Conference be "chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries." On October 22, 1921, the Netherlands Confederation of Trades Unions protested to the International Labor Office that the Netherlands Government had not fulfilled this requirement. The International Labor Conference decided to admit the delegate nominated by the Netherlands Government, in spite of this protest. But at the same time the Conference adopted a resolution calling upon the Governing Body of the International Labor Office to request the Council of the League of Nations to obtain from the Permanent Court of International Justice an opinion as to the proper interpretation of Article 389. The Council of the League of Nations therefore acted at the suggestion of the Governing Body in requesting the opinion.

The Court unanimously concluded that the Netherlands Government's nomination had complied with Article 389 of the Treaty of Versailles. The main ground of the opinion was that in a country where there are several organizations of workers or employers, all of these organizations may be taken into consideration in the nomination of a workers' or employers' delegate, and not

merely that one which has the largest membership, even though the one may be the "most representative."

This opinion was communicated to the Council of the League of Nations and transmitted by the Council to the Director of the International Labor Office. It constitutes a distinct clarification of the Labor Part of the Peace Treaties, and in the future it will greatly assist the governments in nominating non-government delegates to the International Labor Conference.

Second Advisory Opinion of the Permanent Court of International Justice.—Agricultural Labor and the International Labor Organization[1]

The competence of the International Labor Organization extends to the conditions of labor of persons employed in agriculture.

On May 12, 1922, the Council of the League of Nations adopted a resolution requesting the Permanent Court of International Justice to give an advisory opinion on the following question: "Does the competence of the International Labor Organization extend to the international regulation of the conditions of labor of persons employed in agriculture?" The question came before the Court at its first regular session on June 15, 1922. Oral statements were made before the Court on behalf of the British, French, Portuguese and Hungarian Governments, and on behalf of the International Labor Office, the International Agricultural Commission and the International Federation of Trades Unions.

At the first session of the International Labor Conference in Washington, in 1919, it had been decided to place on the agenda of a future session the subject of agricultural labor. At the third session in 1921, three items relating to agricultural labor were included in the agenda. The question of competence was raised before the Conference by the French Government. The International Labor Conference declared itself competent on October 27, 1921, by a vote of 74 to 20. Later the Conference adopted several measures dealing with the protection of agricul-

[1] Reported in Publications of the Permanent Court of International Justice, Series B, No. 2.

tural workers. It was the French Government which brought the matter to the Council of the League of Nations in 1922, and this was done without first raising the question in the Governing Body of the International Labor Office.

On August 12, 1922, the Court decided to reply to the Council of the League of Nations that the competence of the International Labor Organization does extend to international regulation of the conditions of persons employed in agriculture. A majority of the judges found the language of the Treaty of Versailles free from any ambiguity on this point. It was said that "every argument used for the exclusion of agriculture might with equal force be used for the exclusion of navigation and fisheries."

Judge Weiss (France) and Deputy-Judge Negulesco (Rumania) declared that they were unable to concur in the opinion given by the Court.

The opinion was duly transmitted to the Council of the League of Nations and by the Council to the French Government.

Third Advisory Opinion of the Permanent Court of International Justice.—Agricultural Production and the International Labor Organization[1]

The competence of the International Labor Organization extends to agricultural production only in so far as conditions of labor are concerned.

On July 18, 1922, the Council of the League of Nations adopted a resolution requesting the Permanent Court of International Justice to give an advisory opinion on the following question: "Does examination of proposals for the organization and development of methods of agricultural production, and of other questions of a like nature, fall within the competence of the International Labor Organization?" The Court was in session at the time this resolution was adopted, and was duly notified of the request. Arguments were heard on behalf of the Freneh Government and the International Labor Office.

The question had been first raised in the Council of the League of Nations by a letter of the French Government of June 13, 1922.

[1]Reported in Publications of the Permanent Court of International Justice, Series B, No. 3.

The Director of the International Labor Office stated that the International Labor Organization did not claim to have competence as to agricultural production. Negotiations between the International Labor Office and the International Institute of Agriculture had brought a common view to the two organizations as to the proper delimitation of their respective spheres of action.

On August 12, 1922, the Permanent Court of International Justice expressed the unanimous opinion that while the organization and development of "means of production" had not been included in the sphere of the International Labor Organization, it was not necessary that the Organization "totally exclude from its consideration the effect upon production of measures which it may seek to promote for the benefit of the workers." It was made clear that "the consideration of methods of organizing and developing production from the economic point of view is in itself alien to the sphere of activity marked out for the International Labor Organization by Part XIII of the Treaty of Versailles."

This opinion was duly communicated to the Council of the League of Nations and by the Council to the French Government. With the two preceding opinions, it has assisted the Labor Organization to chart its course, and has thus contributed to the easier co-operation of the nations engaged in considering and adopting uniform labor legislation.

Fourth Advisory Opinion of the Permanent Court of International Justice.—Nature of Dispute About Nationality Decrees [1]

The British-French dispute over nationality decrees in Tunis and Morocco is not by international law solely a matter of domestic jurisdiction within paragraph 8 of Article 15 of the Covenant, though nationality questions in general fall within a state's domestic jurisdiction.

On October 4, 1922, the Council of the League of Nations addressed itself to the following item which had been placed on its agenda at the request of the British Government on August 11,

[1] Reported in the Publications of the Permanent Court of International Justice, Series B, No. 4.

1922: "Dispute between France and Great Britain as to the nationality decrees issued in Tunis and Morocco (French Zone) on November 8, 1921, and their application to British subjects, the French government having refused to submit the legal questions involved to arbitration." The Council took note of "friendly conversations" which had taken place between representatives of the British and French Governments, and pursuant to an agreement between the parties, adopted the following resolution:

(*a*) The Council decides to refer to the Permanent Court of International Justice, for its opinion, the question whether the dispute referred to above is or is not by international law solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant);

(*b*) And it requests the two Governments to bring this matter before the Permanent Court of International Justice, and to arrange with the Court with regard to the date on which the question can be heard and with regard to the procedure to be followed;

(*c*) Furthermore, the Council takes note that the two Governments have agreed that, if the opinion of the Court upon the above question is that it is not solely a matter of domestic jurisdiction, the whole dispute will be referred to arbitration or to judicial settlement under conditions to be agreed between the Governments.

On October 4, 1922, the Secretary-General of the League of Nations transmitted to the Registrar of the Permanent Court of International Justice a copy of the above resolution "for the information of the Permanent Court of International Justice." This was not treated as a request for an advisory opinion under Article 72 of the Rules of Court, but such a request was sent by the Secretary-General on November 6, 1922. The matter was before the Court as a request for an advisory opinion, although at various stages in the proceedings it was referred to by counsel as if Great Britain and France were parties before the Court in a dispute between them.

The arrangements for calling an extraordinary session of the Court were made by the President with the aid of suggestions from the British and French Governments. The two Governments fixed upon November 25, 1922, as the date for the submission of cases, and December 23, 1922, as the date for the submission of counter-cases. When the Court met in extraordinary session to consider the matter on January 8, the British Government

was represented by Mr. George Mounsey, as Agent, and by the Right Hon. Sir Douglas Hogg, K.C., M.P., His Britannic Majesty's Attorney-General, and the Right Hon. Sir Ernest Pollock, Bart., K.B.E., K.C., M.P., as Counsel. The French Government was represented by M. Mérillon as Agent and Professor de Lapradelle as Agent-Adjoint. Each Government submitted a case and a counter case, and the Court also heard oral arguments from both. The arguments before the Court consumed five days, and during the extraordinary session January 8 to February 7, the Court held twenty meetings.

The dispute had arisen as a consequence of the promulgation by the French Government of decrees converting certain British subjects in Tunis and Morocco (French zone) into French citizens, with the consequence that the French Government began to enforce a liability for military service in the French army. Extended negotiations between the British and French Governments had been conducted before the original communication of the question to the Council of the League of Nations. In these negotiations, Great Britain had relied upon various treaties applying to the French protectorates over Tunis and Morocco, especially the Anglo-French arrangement of September 18, 1897, containing a most-favored-nation clause. But the British insistence had failed to produce any modification in the French decrees, and the French Government had contended throughout that the matter was not open to settlement by diplomatic negotiation.

The argument before the Court was addressed to the single question of the nature of the dispute, and the Court very conscientiously confined itself to the limits of that question. The British Government contended that the existence and abrogation of various treaties were involved, as well as the construction of the terms of such treaties, with the result that the question must be one of an international nature. The French Government contended on the other hand, that "the sovereign right of a nation to legislate upon nationality questions within its own territory governs the situation in Tunis and Morocco under French protectorate as in France itself." It was insisted that the French protectorates in Tunis and Morocco demanded the "progressive assimilation of the customs and laws of the protectorate to those of the protecting country." France refused to admit that

there was any limit on her power in this respect as a result of any applicable international engagement.

On February 7, 1923, the Court handed down a unanimous opinion holding that the dispute "is not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8 of the Covenant)." In the first place, it was held that the language of the Covenant was not to be given "an extensive interpretation." And the following passage from the opinion of the Court seems to indicate a due regard for the influence which its pronouncements are likely to have on future conduct:

> The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

It was clearly held that a dispute does not achieve an international character merely as a consequence of its being brought before the Council of the League of Nations, nor as a consequence of appeals by a party to the dispute to engagements of an international character. The Court found the Aaland Islands case authority for this proposition. The French protectorates of Tunis and Morocco were examined in great detail, and it was concluded that while a state possesses exclusive jurisdiction in regard to nationality questions in its own territory, it is a question of international law whether such a jurisdiction extends over protected territory as well. The French Government had contended that certain treaties relied upon by Great Britain had lapsed as a result of the principle of *rebus sic stantibus*. This was held by the Court to be a question of international law. The effect of British declarations in the past with regard to Tunis was also found to be involved, and this was clearly a question of international law. Great Britain's reliance on the most-favored-nation clause in the Anglo-French arrangement of September 18, 1897, had also raised a question of international law.

It is notable that the French judge on the Court, Judge Weiss, concurred in the opinion that for these numerous reasons the dispute was not by international law solely a matter of domestic jurisdiction.

When the opinion was announced on February 7, the Agent for the French Government immediately declared that its conclusions were accepted by the French Government and that the French Government desired the case to be submitted on its merits to the Permanent Court of International Justice. This later proposal was not immediately agreed to by the British Government, however. When the Court again met on June 15, 1923, the French and British Governments informed the President of an amicable arrangement concluded between them on May 24, the result of which was to compromise the matter in such a way as to call for no further proceedings before the Court. The French Government had agreed to permit certain British nationals to decline French nationality, on the understanding that the privilege of declination did not extend to succeeding generations. It was stated in the arrangement that neither government would abandon its point of view, nor would the arrangement itself form a precedent for the future. The differences between the Governments, therefore, having lost their practical importance, did not call for further proceedings before the Permanent Court of International Justice.

Fifth Advisory Opinion of the Permanent Court of International Justice—Dispute between Finland and Russia[1]

Where an advisory opinion on the legal effect of treaty provisions would involve a prejudging of a dispute with reference to the execution of such treaty provisions, the Court will not give such an advisory opinion unless both parties submit to the Court's jurisdiction.

On April 21, 1923, the Council of the League of Nations adopted a resolution requesting the Permanent Court of International Justice to give an advisory opinion on the following question: "Do Articles 10 and 11 of the Treaty of Peace between Finland and Russia, signed at Dorpat, on October 14th, 1920, and the annexed Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation

[1] Reported in Publications of the Permanent Court of International Justice, Series B, No. 1.

to Finland as to the carrying out of the provisions contained therein?"

The question came before the Court at its fourth session which began on June 15, 1923. Notice of the request had been circulated as required by Article 73 of the Rules of Court, and by special decision notice was sent to the Soviet Government of Russia. Various documents were submitted to the Court by the Council and by Finland, and a representative of the Finnish Government was heard in oral argument. The Russian People's Commissary for Foreign Affairs, M. Tchitcherin, sent the Court a long telegram stating that his government found it "impossible to take any part in the proceedings" which it regarded as "without legal value either in substance or in form."

In its opinion announced on July 23, 1923, the Court found that an "acute controversy" existed between Finland and Russia with regard to the Declaration which had been made at Dorpat concerning Eastern Carelia. "The Finnish Government maintain that it forms part of the contract between the two countries and that the Treaty was signed on the terms that the Declaration was as binding as the Treaty itself. The Soviet Government maintain that the Declaration was not by way of contract, but was only declaratory of an existing situation and made merely for information." To attempt to deal with this controversy even to the limited extent of giving an advisory opinion, "would be substantially equivalent to deciding the dispute between the parties."

But the Court found it to be "well established in international law that no State can without its consent be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." The Court intends to abide by this principle very strictly. "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court." So in this case the Court regretfully declined to give any opinion. Yet it took account of the long history of the dispute, and added that it did not "regret that the question has been put" by the Council of the League of Nations, for "all must now realize that the Council has spared no pains in exploring every avenue which might possibly lead to some solution."

Four of the judges did not share the conclusions of the majority, however. These conclusions are rather curiously referred to as an "opinion," and are published in the "Collection of Advisory Opinions," though in reality they amount to a refusal to give an opinion. This refusal is a clear indication of the judges' determination that the limitations surrounding judicial action are to be rigidly observed, even in the exercise of their function of giving advisory opinions.

First Judgment of the Permanent Court of International Justice—Case of the S. S. *Wimbledon*, involving freedom of the Kiel Canal [1]

Article 380 of the Treaty of Versailles of June 28, 1919, forbids Germany's applying to the Kiel Canal a neutrality order which would close the canal to a British vessel under French charter carrying munitions to Danzig for transshipment to Poland during a war between Poland and Russia.

On January 16, 1923, the British, French, Italian and Japanese Governments made "application" to the Permanent Court of International Justice asking for judgment whether the German Government "is present or absent," that "the German authorities wrongfully refused on March 21, 1921, free access to the Kiel Canal of the steamship 'Wimbledon,' " and that reparation be awarded for the loss incurred by the *Wimbledon*. The application set forth the provision in the Treaty of Versailles (Art. 380) that "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality." To vest jurisdiction in the Court, the applicant Powers relied on Article 386 of the Treaty of Versailles, though Germany seems to have been entirely willing to go before the Court and did not at any time contest the jurisdiction. [2]

The Court was seised of the case when it met on June 15, 1923. Under Article 31 of the Court Statute, a German national, Pro-

[1] Reported in the Publications of the Permanent Court of International Justice, Series A, No. 1.

[2] See 18 American Journal of International Law, p. 11.

fessor Walter Schücking of the University of Berlin, had been named by Germany to sit as a judge *ad hoc*. On June 28, Poland's application to "intervene" was approved. The applicant Powers had submitted a *case* on March 17; Germany a *counter-case* on April 20; the applicants a *reply* on May 18; and Germany a *rejoinder* on June 15. Between July 5 and July 10 oral arguments were heard by the agents of each of the six Powers that were parties, the German agent speaking in the German language and the other agents speaking in French or English.

The facts were admitted, though there was some controversy as to whether Poland and Russia were still at war on March 21, 1921, when the *Wimbledon* was excluded from the Kiel Canal. The chief problem related to the construction to be placed on Article 380 of the Treaty of Versailles. In the judgment handed down on August 17, 1923, the Court found "that the terms of Article 380 are categorical and give rise to no doubt." The conclusion followed "that the canal has ceased to be an internal and national navigable waterway, the use of which by vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world." Hence the Court found Germany under an obligation to keep the Kiel Canal "open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany."

The Court referred to the "precedents afforded by the Suez and Panama Canals" which in its opinion "invalidate in advance the argument that Germany's neutrality would have necessarily been imperilled if her authorities had allowed the passage of the *Wimbledon*." The Canal has become so "assimilated to natural straits" that even "the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie." It was not necessary to say whether the war between Poland and Russia had terminated, for in any case Germany had a duty by treaty to allow the *Wimbledon* to pass. Her refusal was therefore wrongful, and Germany "is responsible for the loss occasioned by this refusal

and must compensate the French Government" acting on behalf of the French firm of charterers. The amount of compensation awarded was 140,749.35 francs, as against 165,749.35 francs claimed.

Three of the judges dissented, including the German national judge. Judges Anzilotti (Italy) and Huber (Switzerland) thought that the "legal status of the Kiel Canal resembles that of the internal navigable waterways of international concern"; that Germany's obligation to maintain the Canal free and open "does not exclude her right to take the measures necessary to protect her interests as a belligerent or neutral power"; and that Germany's neutrality regulation in this case was not "an arbitrary act calculated unnecessarily to impede traffic." Judge Schücking (Germany) thought that a servitude had been imposed on the Kiel Canal, which called therefore for a restrictive interpretation; and in this case the passage of the *Wimbledon* would not have been "compatible with Germany's duties as a neutral toward Russia."

The decision is a notable one for several reasons. It is the first contested case to come before the Permanent Court of International Justice, all the other cases having come by requests for advisory opinions. It is the first case in which a specially chosen national judge has participated. It will constitute for the future a valuable addition to international law as to the Kiel Canal and as to the use of all inter-oceanic canals in time of war.

Sixth Advisory Opinion of the Permanent Court of International Justice—Protection of German Settlers in Poland[1]

Poland's international obligations under the Minorities Treaty of June 28, 1919, involve the protection of German colonists sent into German Poland before the war, requiring Poland to respect contracts and leases made by the German Government with these colonists; and the position taken by Poland after the war was not in conformity with its international obligations.

On February 3, 1923, the Council of the League of Nations adopted a resolution requesting the Permanent Court of Interna-

[1]Reported in Publications of the Permanent Court of International Justice, Series B, No. 6.

tional Justice to give an advisory opinion on two questions: (1) whether Poland's refusal to recognize contracts and leases made by certain German colonists with the German Colonization Commission before the end of the war, involved an international obligation within the competence of the League of Nations under the Polish Minorities Treaty of June 28, 1919; and, (2) if so, whether Poland's position with respect to these contracts and leases was in conformity with her international obligations.

The matter came before the Court when it met for its fourth session on June 15, 1923. Various documents were submitted by the Council of the League of Nations and by the Polish and German Governments. Oral arguments were heard also by the representatives of the Polish Government, Count Rostoworski and Sir Ernest Pollock, formerly Attorney-General of Great Britain, and by the representative of Germany, M. Schiffer, ex-minister of Justice.

The Polish Government had ousted two classes of German colonists: those holding under contracts entitling the colonist to receive title to the land, where the definitive conveyance had not been completed until after the armistice of November 11, 1918; and those holding under leases for which such contracts had been substituted after the date of the Armistice. On May 17, 1922, the Council of the League of Nations had requested Poland to suspend such measures.

In its opinion announced on September 10, 1923, the Court first considered the competence of the League of Nations to deal with the matter, under the provisions of the Minorities Treaty. In this connection, it held that "the fact that no racial discrimination appears in the text of the law of July 14, 1920, and that in a few instances the law applies to non-German Polish nationals who took as purchasers from original holders of German race, makes no substantial difference. . . . There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law." It then held that the German Government "is to be considered as having continued to be competent to undertake transactions falling within the normal administration of the country" in the period between November 11, 1918, when the Armistice was signed, and January 10, 1920, when the Treaty of Versailles came into force.

Proceeding then to examine the legal character of the contracts under which the settlers held, the Court found that they were enforceable contracts which gave interests in the land not unlike the interests of a holder of an equitable title in Anglo-American law. "A purchaser acquired a *jus ad rem*, and after *auflassung* had a *jus in re*." And it was careful to announce that "the fact that there was a political purpose behind the colonisation scheme cannot affect the private rights acquired under the law." Such private rights, whether acquired by contract or by lease, "do not cease on a change of sovereignty," nor is any treaty provision required to preserve them. No provisions in the Treaty of Versailles had prohibited Germany's dealing with such rights in the ordinary normal way, even after the Armistice, and hence Poland was bound to respect such dealing on taking over the governance of the territory. The Court therefore pronounced that "the position adopted by the Polish Government . . . was not in conformity with its international obligations."

When the question later came before the Council of the League of Nations on December 17, 1923, Poland announced that her policy would be re-shaped to accord with the law enunciated by the Court, and agreed to compensate colonists already ousted illegally and suspend further proceedings against other colonists.

Seventh Advisory Opinion of the Permanent Court of International Justice—Acquisition of Polish Nationality by German Settlers[1]

Under the Treaty for the Protection of Minorities in Poland, the Council of the League of Nations is competent to deal with questions as to acquisition of Polish nationality by German Settlers, and Article 4 of the Treaty makes habitual residence of parents at the date of birth of settlers concerned, but not at any later date, a condition of acquiring nationality.

On July 7, 1923, the Council of the League of Nations adopted a resolution requesting the Permanent Court of International Justice to give an advisory opinion on the competence of the

[1] Reported in Publications of the Permanent Court of International Justice, Series B, No. 7.

League of Nations under the Minority Treaty between the Principal Allied and Associated Powers and Poland, and on the proper interpretation to be placed on Article 4 of that Treaty. The Court was in session when the resolution was adopted, and became seised of the questions on receipt of a letter from the Secretary-General of the League, dated July 11, 1923.

Notice of the request was sent to all Members of the League of Nations, to the United States, Ecuador and the Hedjaz as states mentioned in the Annex to the Covenant, and to the German Government. The decision of the Court to send notice to Germany has evoked some adverse criticism on the ground that Germany is not a party in interest with respect to a question arising under the Minority Treaty between the Allied Powers and Poland, even though the question relates to a Germanic group in Poland. But the Court's action would seem to have been a proper exercise of discretion, even though Article 73 of the Rules of Court did not require it. Oral arguments were heard on behalf of Poland and of Germany, but Rumania's request to be heard came too late.

The question was originally raised by a petition of November 12, 1921, of the Germanic League of Bydgoszcz submitted to the Council. Article 4 of the Minority Treaty provides that

> Poland admits and declares to be Polish nationals *ipso facto* and without the requirement of any formality persons of German, Austrian, Hungarian or Russian nationality who were born in the said territory of parents habitually resident there, even if at the date of the coming into force of the present treaty they are not themselves habitually resident there.

The Polish Government had decided to treat certain persons who were former German nationals as not having acquired Polish nationality and as continuing to possess German nationality, because their parents were not habitually resident in the territory, both on the date of birth of the person concerned and on the date when the Minority Treaty came into force on January 10, 1920. When the question was raised in the Council of the League of Nations, Poland contended that it was not within the jurisdiction of the Council, which was limited to questions concerning minorities consisting of Polish nationals. It was necessary for the Court therefore to deal with this basic question of jurisdiction,

as well as with the proper interpretation of the nationality provisions of the treaty.

In the unanimous opinion handed down on September 15, 1923, the Court held that the matter was within the competence of the League of Nations. The statesmanship of the Court is evidenced by its general appreciation of the nature of the minorities treaties, and the office which they are designed to serve in the postwar world:

> The Minorities Treaties in general, and the Polish Treaty in particular, have been concluded with new States, or with States which, as a result of the war, have had their territories considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance. One of the first problems which presented itself in conneetion with the protection of the minorities was that of preventing these States from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States. It is clearly not a purely fortuitous circumstance that the Treaties for the protection of minorities contain provisions relating to the acquisition of nationality. Again, the fact that in some cases these provisions merely repeat, either in their entirety or in part, principles laid down in the Peace Treaties, would appear to be explained by the intention to extend to these principles the guarantee of the League of Nations, no matter what points of difference or resemblance there may be between these treaties.

Lord Finlay concurred in the conclusions of the Court, but he would have gone further in his definition of the minorities protected by the treaty:

> It therefore appears that while such elementary rights as those of life and liberty are secured to all inhabitants, there are a great many rights seeured to Polish *ressortissants* only, and it is with regard to such rights that the question of unfair treatment of minorities must arise in the immense majority of cases. Of course, it is conceivable that there might be a case in which protection for life and liberty was refused to some unpopular minority of inhabitants. In that case the minority would be one of a mass of inhabitants, whether Polish nationals or not; but such cases must be rare. The point will arise in the immense majority of cases with regard to such Articles as 7, 8 and 9 and the rights which they confer on all Polish *ressortissants* ineluding German or other minorities.

Having decided the question of competence, the Court proceeded to hold that the Polish Government had improperly required that parents of the persons in question should be living in the territory on January 10, 1920, as well as on the date of birth of their children. It was of the opinion that the clause of the Treaty quoted "leaves little to be desired in the nature of clearness." And it was pointed out that the interpretation contended for by Poland would have the effect of depriving of Polish nationality a person born in Poland of parents habitually resident there at the time, simply because his parents were dead on January 10, 1920.

The advisory opinion was duly transmitted to the Secretary-General of the League of Nations, and on September 22, 1923, the Council "adopted" it. The matter has since been the subject of negotiation between Poland and Germany, though Poland appears to be disposed to acquiesce in the decision of the Court.

Eighth Advisory Opinion of the Permanent Court of International Justice—The Jaworzina Boundary Question Between Poland and Czechoslovakia[1]

A decision by the Conference of Ambassadors with reference to the boundary between Poland and Czechoslovakia, accepted by both States, was definitive and the question was not reopened by later negotiations.

On September 27, 1923, the Council of the League of Nations adopted a resolution requesting the Permanent Court of International Justice to give an advisory opinion on the question whether the delimitation of the frontier between Poland and Czechoslovakia in the region known as the Spisz district (Jaworzina) was still open, or whether it should be considered as settled by a definitive decision of the Conference of Ambassadors. The resolution set forth the case of the Polish Government and the case of the Czechoslovak Government, and the Council requested the two governments concerned to be prepared to assist the Court by furnishing it with relevant documents and information. A

[1] Reported in Publications of the Permanent Court of International Justice, Series B, No. 8.

dossier communicated to the Council by the Conference of Ambassadors was transmitted to the Court.

The Court became seised of the matter on receipt of a letter from the Secretary-General of the League of Nations, dated September 29, 1923. In view of the urgency, the Court convened in extraordinary session on November 12, 1923. This session continued from November 12 to December 6, when the opinion was handed down. The Polish Government was represented by M. Mrozowski, President of the Supreme Court of Poland, and the Czechoslovak Government by Professor Krcmar and Dr. Krno. Oral arguments on both sides were heard on November 14.

The question of the boundary between Poland and Czechoslovakia had long been before the Conference of Ambassadors at Paris, which on July 27, 1923, decided to lay the difficulties before the Council of the League and to ask the Council to recommend a solution. It was stated that the Governments represented in the Conference of Ambassadors would have no objection should the Council see fit to ask the opinion of the Court of International Justice on the legal questions involved. It had been decided on September 27, 1919, that a plebiscite should be held in the Spisz district, but so many difficulties developed that the Spa Conference in July, 1920, suspended this arrangement. On July 28, 1920, the Conference of Ambassadors at Paris had decided upon a boundary line between Poland and Czechoslovakia, subject to modifications of detail by a delimitation commission. This decision had been accepted by both Poland and Czechoslovakia. Later negotiations had been undertaken, however, which continued for three years without reaching any different result. So it became necessary to determine whether the decision of the Conference of Ambassadors of July 28, 1920, had a final character.

The opinion of the Court was unanimous that the decision of July 28, 1920, was to be treated as definitive. "The final character of the decision referred to above is also shown, with special clearness, by the declaration appended to the decision, which is signed by the plenipotentiaries of Poland and Czechoslovakia." Not only was "the task entrusted to the Conference of Ambassadors by the Supreme Council fulfilled by the decision of the Conference, but the decision itself was put into execution." It was necessary for the Court to review the entire history of the negotiations

which followed the Spa Conference. Throughout this review, the Court showed a disposition to take account of the complexities of the postwar situation and the difficulties in stabilizing it.

"When, as a result of the European War and the dissolution of the Austro-Hungarian Monarchy, Poland and Czechoslovakia were re-established as independent States, their frontiers were, generally speaking, indicated by the same historical and ethnological factors which had led to their reconstitution.

The necessity remained, however, either for a formal pronouncement with regard to the extent of the territories respectively allocated to two States above-mentioned or for a settlement of territorial questions in regions where, owing to special circumstances, the historical or ethnological frontier remained uncertain or met with difficulties which prevented the parties concerned from voluntarily accepting it.

The task of ensuring the recognition of the frontiers of the new States and of settling disputes which might arise between them was undertaken by the Principal Allied and Associated Powers represented in the Supreme Council then sitting at Paris."

But the two States were held to have given to the decision of the Conference of Ambassadors "over and above the authority possessed by a decision of the Principal Allied and Associated Powers," the "force of a contractual obligation."

A question also arose as to the effect of later interpretations placed on the decision by the Conference of Ambassadors itself. The Court refused to admit that the Conference was competent to change the clear effect of a decision by a later interpretation.

"The duties of the Conference, as has already been pointed out by the Court, had some points in common with those of an Arbitrator entrusted by two States with the settlement of a frontier dispute between them. But in the absence of an express agreement between the parties, the Arbitrator is not competent to interpret, still less modify his award by revising it. The decision of July 28th, which was accepted by the Polish and Czechoslovak Governments, contains no mention of an agreement of this kind."

Through long and tedious negotiations by different officials, the Court traced the history of the efforts to reach a settlement of the boundary question without its aid. In the end, it was determined that these negotiations did not have the effect of upsetting the original decision of the Conference of Ambassadors on July 28,

1920, which is definitive. It was pointed out, however, that this decision should be applied in its entirety, with authority in the delimination commission to make modifications of detail in marking out the actual boundary.

The advisory opinion was duly transmitted to the Council of the League of Nations which met in Paris in December, 1923. An effort has since been made to reach agreement between Poland and Czechoslovakia on the basis of the Court's conclusions.

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